Supreme Court, U.S.
FILED

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10-144 NOV 16 2009

In The

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES OF AMERICA

No. _____

Heirs And Beneficiaries Of Marjorie C. Schneller, James D. Schneller, trustee ad litem; Estate Of Marjorie C. Schneller, James D.Schneller, trustee ad litem; Estate Of Marjorie C. Schneller, Marjorie Zitomer, personal representative; Estate Of George H. Schneller, James D. Schneller, personal representative

v.

Able Home Care Inc., Marianne Lilienthal, Holly Nelson, Jane Doe 1, respondents

James D. Schneller, petitioner

PETITION FOR WRIT OF CERTIORARI

On Petition of Plaintiff James D. Schneller for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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I. QUESTIONS PRESENTED

1) Has the deciding Court erred voluminously, unfairly, and as needful of reversal, in dismissing appeal without specifying the reason, and in not permitting payment of the fee despite that avenue being the express solution granted in the case that is cited as the sole authority ?

2) Has a single Judge of the deciding Court erred voluminously, unfairly, and as needful of reversal, in denying a concise motion to amend motion for rehearing, despite that motions' express likelihood of validly affecting the request for rehearing ?

3) Has the Clerk of the Third Circuit Court of Appeals erred egregiously in refusing leave to pay the fee and declaring petitioner's request to pay, to be a second motion for rehearing; in declaring that second motions for rehearing are not allowed, and in refusing a motion to that effect, despite the undeniably abundant support for a granting of the request ?

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To the Justices of the Supreme Court:

Petitioner James D. Schneller, representing himself, on behalf of all plaintiffs, requests an order, and writ of certiorari to the Third Circuit Court of Appeals, and relief in the alternative, stating as follows :

II. PARTIES

All parties appear in the caption of the case on the cover page.

III. JURISDICTION

This petition is taken from a decision of a United States Circuit Court of Appeals. The date on which the United States Third Circuit Court of Appeals decided this case was July 21, 2009. The order denying rehearing of the decision was

entered on August 17, 2009. True and correct copies of the Orders are seen in the Appendix.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

Petitioner has raised his objections and arguments in regard to the issues presented in this petition, in the proceedings below. Petitioner raised all issues including the within questions, in the pleadings which he presented to the trial Court, making certain to preserve any issues, due to lack of hearing and failure of the defendants to appear, in the motion for relief and the motion for leave to appeal in forma pauperis. Petitioner raised all issues including the within questions, in the pleadings which he presented to the Circuit Court, making certain to preserve any issues, due to unexpected brevity of the proceedings, in the motion for rehearing, motion to amend motion for rehearing, and the undocketed motion to reverse the clerks refusal to accept the fee and for review of an order by a single judge. Each issue in these proceedings was responded to by respondents or was afforded an opportunity for response by respondents.

The Clerk in response to petitioner's request to pay the fee in installments, granted petitioner leave to pay the fee, and directed petitioner to submit the petition in booklet

format, by today.

IV. OPINIONS BELOW

The United States Court of Appeals for the Third Circuit decided this case in an order, dated July 21, 2009. (Exhibit A)

There was no opinion issued in this case in any Court.

V. STATEMENT OF THE CASE

1. The complaint, civil action No 08-1003, was filed in the U.S. District Court for the Eastern District of Pennsylvania ("District Court") with a motion to proceed in forma pauperis, on February 27, 2008. Plaintiffs, a caregiver son, the petitioner, and the estates of his deceased parents, allege extraordinary deprivals of rights, and conspiracy to so inflict, against a home nursing agency, their manager-owners, and an employee of the agency, who failed to call an ambulance despite onset of severe medical emergency to an elderly care dependent woman, and left her alone despite knowledge that co-plaintiffs, her caregivers, were at a surgical procedure. State torts and intentional torts are also claimed.

2. The District Court in the order signed on March 10, 2008 and entered on March 11, 2008, denied plaintiffs leave to proceed in forma pauperis "for the reason that he has the financial means to pay the $350 filing fee" and finding after a "preliminary review", a lack of jurisdiction.

3. Plaintiff James D. Schneller ("plaintiff", "petitioner"), despite his poverty, was able to save the fee, and paid the fee to the Clerk on April 8, 2008.

4. The District Court in the Order entered on November 13, 2008 ordered plaintiffs' motion for extension of time for service denied "as moot" for reason that the complaint was "dismissed" "on March 10, 2008" and plaintiffs failed to file a timely appeal.

5. Plaintiff James D. Schneller ("plaintiff") filed in the District Court on or about December 1, 2008 a timely motion for relief from the order of November 13, 2008, asking that the order be vacated, for reasons including that plaintiff had duly paid the filing fee of $ 350.00 within 30 days of the order stated in the preceding paragraph, on April 8, 2008, which was 27 days after entry of the order denying forma pauperis. Summonses had been issued by the Clerk on May 21, 2008.

6. Plaintiff stated additional reasons in the motion for relief, including that plaintiff filed the motion for extension of time for service on June

26, 2008, but soon thereafter discovered that service may be accomplished by way of a U.S.P.S. delivery requiring the signature of a recipient. Plaintiff attempted said service and, to his surprise, some of it was accepted, and so plaintiff filed affidavits of service on defendants.

7. The District Court on December 2, 2008 entered an Order which denies said motion for relief, and finds that the order dated November 13, 2008 dismissed the case for lack of jurisdiction.

8. Plaintiffs therefore timely filed, in the District Court, a Motion for Leave to Appeal in forma pauperis. This was denied in an order entered on January 30, 2008, finding again a prior dismissal, and that no change in plaintiff's financial circumstances had occurred.

9. Plaintiffs then filed a motion to proceed in forma pauperis in the Third Circuit Court of Appeals ("3d Circuit"), No. 09-1716, which was granted by the Clerk, in an Order submitting the appeal "to a panel for determination under 28 U.S.C. Section 1915(e)(2) or for summary action under Third Circuit L.A.R. 27.4 and I.O.P. 10.6."

10. In an order entered July 21, 2009 a panel of the Third Circuit dismissed the appeal without prejudice, quoting a single authority, without further explanation. (Exhibit A)

11. Plaintiffs filed a motion for rehearing and for en banc consideration, claiming, inter alia, the

overt conflict of the decision with voluminous decisions of the Circuit Courts and this Court, and noting their right to pay the filing fee.

12. Petitioner, six days later, filed a motion to amend the motion for rehearing, requesting leave to add new fact concerning a new, pertinent, decision by the District Court. This was denied the next day by a single judge without any findings or conclusions.

13. The motion for rehearing was denied in an order dated August 17, 2009.

14. Plaintiffs then wrote the Clerk seeking permission to pay the fee noting, inter alia, the vagueness in the order, and their right under the law, and under the cited authority, and because of lack of any prejudice stated. Permission was denied and the Clerk's law office intimated that any additional pleading would be deemed a second request for rehearing, declaring that to be improper. Plaintiffs, after receiving no answers to their phone calls, submitted their motion to reverse the clerks refusal to accept the fee and for review of an order by a single judge, asking in the alternative, treatment of it as a petition to open the matter of rehearing due to action taken by the Clerk, such as might be filed if an issue arose with mandate or other post-appeal matter. That motion has not been docketed up to present. Plaintiffs sent this petition via U.S.P.S. on the 90th day from

issuance of the order denying the motion for rehearing.

15. Defendants, who took no part in this case at all, participated in a State Court case which ended in a similarly vague and unjust manner.

VI. REASONS WHY CERTIORARI SHOULD BE GRANTED

1. Has the deciding Court erred voluminously, unfairly, and as needful of reversal, in dismissing appeal without specifying the reason, and in not permitting payment of the fee despite that avenue being the express solution granted in the case that is cited as the sole authority ?

The Circuit panel has dismissed the appeal submitted to them by the Clerk, in a one sentence order, citing Callihan v. Schneider, 178 F.3d 800, (6th Cir.1999). In Callihan, the 6th Circuit Court of Appeals directs that filing fees must be paid within thirty days of a district court's certification that an appeal in forma pauperis (IFP) would not be taken in good faith.

The Third Circuit errs and may abuse discretion because this case has not been certified by the District Court as taken in bad faith.

Moreso, dismissal of this case has never been explained in any way nor measure that is not vague and inconclusive. Appeal of this case in fact had a likelihood of success. The fact that the Clerk approved forma pauperis in fact supports this claim because their deciding of forma pauperis petitions is permitted at least a cursory review of the quality and verity of the appeal.

The Third Circuit may also abuse discretion because they have taken summary action in conflict with the local rule. 3d Cir. L.A.R. 27.4 states:

> 27.4 Motions for Summary Action
>
> A party may move for summary action affirming, enforcing, vacating, remanding, modifying, setting aside or reversing a judgment, decree or order, alleging that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action. In addition, the court may *sua sponte* list a case for summary action.

The Third Circuit has not only erred patently in finding that "no substantial question is presented," which is equivalent to the apparent frivolousness or lack of verity inherent in the order dismissing appeal, but have also, presuming that the motion

to amend motion for rehearing was at least within their knowledge, not granted sua sponte review of the order of the single judge, which was undeniably needed because of it's express effect, and possible intent, of omission of "change in circumstances" warranting the opposite sort of summary action, namely reversal or vacating.

The Third Circuit errs in law and misapprehends law and fact in their finding and conclusion, stated as a quote from Callihan, that "Any appeal from an order denying pauper status on appeal will not be entertained and shall be dismissed sua sponte." This quote is taken out of context and is patently in conflict with the hundreds of pertinent decisions of this Court and all Circuit Courts including the Third Circuit. Abuse of discretion may be further evident because the underlying decision is also error and misapprehension of law and fact. The record was transmitted to the Circuit Court.

The Third Circuit has abused discretion because they have taken summary action in conflict with 3d Ct. Internal Operating Procedures Rule 10.6 because they have done so despite the fact that a "substantial question is presented" and that no "subsequent precedent or a change in circumstances" warranted their action.

The Third Circuit has also abused discretion because they have taken summary action in

conflict with 3d Ct. I.O.P. Rule 10.6 because they have done so despite the fact that they did not "afford the parties an opportunity to submit argument in support of or in opposition to such disposition if briefs on the merits have not already been filed" and also because the decision has not been made " by unanimous vote of the panel" or any unanimity has not been stated in the Order.

The Third Circuit may insinuate findings of frivolousness. These would be error of law and misapprehension of fact. In order to respect congressional goal of assuring equality of consideration for all litigants, initial assessment of frivolousness of in forma pauperis plaintiff's factual allegations must be weighted in favor of plaintiff. Denton v. Hernandez, U.S.Cal.1992, 112 S.Ct. 1728, 504 U.S. 25, 118 L.Ed.2d 340.

The dismissing order, in the bare statement of the case relied upon, without any explanation, is in error. This vagueness, with all respect for the Courts, can only indicate a need to circumvent the accepted level of fairness and notice required of all United States Courts, and has indeed, on leading to arbitrary and vague actions, served said purpose, thus warranting a finding of abuse of discretion, and reversal.

The Circuit Court Clerk has subsequently relied on a ministerial sleight of hand that ignores the clear directive in Callihan that payment of fees

be permitted even in frivolous appeals. If the Clerk and their legal staff were permitted to prevent appeals through procedural mazes, the due process right to review would suffer immeasurably.

The initial finding that plaintiffs had foregone the case because time to appeal had passed was an abuse of discretion because plaintiffs diligently paid the filing fee, within 30 days of denial of forma pauperis, and this is a permissible resolution to denial of forma pauperis, in all U.S. District Courts. Neither the Court, nor the Clerk, ordered a time within which plaintiff must pay the fee.

No Order directs that frivolousness is present, nor relevance of 28 USC § 1915. Denial of forma pauperis was an error of law and misapprehension of fact. Purpose of this section is to provide an entre, not a barrier, to the indigent seeking relief in federal court. Souder v. McGuire, C.A.3 (Pa.) 1975, 516 F.2d 820. Plaintiff has made many proofs to the trial Judge and the Appeals Court that he lives a life of bare subsistence. "Plaintiff would be granted leave to appeal in forma pauperis, where his affidavit of indigency indicated that he received monthly social security income of about $1000, and had $25 in a checking account, and that his monthly expenses totaled approximately $980. Chatman v. Allegheny County, PA, C.A.3 (Pa.)2005, 144 Fed.Appx. 216, 2005 WL 1515091, Unreported.

The District Court has made no findings nor conclusions why jurisdiction is lacking.

Plaintiff was forced to hypothesize possible additional reasons why the complaint was ended. Both Courts erred substantially in leaving the chalkboard blank so as to further inhibit plaintiffs' chances of litigating the case in the future. This is partiality and bias, and is an appearance of bias to any observer, trained or not.

Plaintiff's service on the defendants was made within 120 days of filing of the complaint, which is in compliance with F.R.C.P. 4.

Plaintiff's financial condition warranted grant of forma pauperis and the trial Court was apprised of plaintiff's knowledge that he was deprived of rights to due process and access to Courts and right to defend life, liberty and property, all of this in circumstances of overt retaliation, impoverishment, and intimidation.

The District Court orders clearly warranted appeal because the allegations taken as true show substantial viable federal questions and torts. The Third Circuit, about a year prior, had reversed similar dismissals in two different cases, remanding for pre-trial proceedings subsequent to service. This is material conflict with precedent because it has no legal basis.

The District Court Orders stated in paragraphs 4 and 7, namely, the final order, which denies the motion for extension of time for service[1], and the order denying the motion for relief from that order, are patent and overt error, because the original order denying forma pauperis did not dismiss and only suggested lack of jurisdiction. Thus the dismissal now present in this Court after affirming, and any definitive finding of lack of jurisdiction, is never formally found and noted, other than in footnotes in subsequent orders.With all respect for the Courts, the convoluted nature of the docket and records in this otherwise straightforward case, show efforts to ministerially and superficially re-mold the case and the forma pauperis aspect into something they are not, while awaiting a window to ultimately end the case.

No defendant has answered the complaint in any way, despite the burden of proof on them to do so. Rules and statutes governing petitions to proceed on appeal in forma pauperis from criminal cases apply to in forma pauperis petitions filed in civil cases; hence, it is not the burden of the petitioner, be he a civil or criminal litigant, to show that the appeal has merit but, rather, it is the

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[1] This order was perceived by plaintiffs as the final and appealable order because on request for relief the trial Court twice again noted a dismissal and a lack of jurisdiction.

burden of the government to show that the appeal is lacking in merit. Tate v. Werner, E.D.Pa.1975, 68 F.R.D. 513.

Plaintiffs' breach of contract claim causes all the more timeliness of the claim under 42 Pa. C.S.§5525 which directs a limitation of time of 4 years, and 42 Pa. C.S.§5527 which directs a limitation of time of 6 years. Plaintiff has asserted valid federal question claims under 42 U.S.C.§ 1985(2), 42 U.S.C.§ 1985(3), and 42 U.S.C.§ 1983 , claiming the discovery rule, equitable tolling, and continuing violation.

Sua sponte dismissal of claims asserted by in forma pauperis plaintiff is strongly disfavored. Deutsch v. U.S. Dept. of Justice, D.D.C.1995, 881 F.Supp. 49, affirmed 93 F.3d 986, 320 U.S.App.D.C. 323.

Plaintiffs claimed well-pled federal questions pursuant to 28 U.S.C.1331, and the complaint requires resolution of substantial questions of federal law . Plaintiffs claimed valid supplementary jurisdiction. Plaintiffs requested Federal oversight because the state claims are nearly extinct in the State Courts, and a grave unfairness and miscarriage of justice thus occurring.

Diversity Jurisdiction is claimed to exist because plaintiff has duly attempted to find

Marianne Lilienthal and Jane Doe 1 in the State of Pennsylvania and has been unable to do so. The house formerly occupied by Marianne Lilienthal in Bryn Mawr, PA, has been plainly, and obviously, vacant since soon after plaintiffs filed their State claim against defendants in 2003. It remains in that party's ownership as of October 2008.

Plaintiffs claim jurisdiction for numerous other reasons including because of statutory jurisdiction over all claims against Marianne Lilienthal and Jane Doe 1, pursuant to 42 Pa.C.S. §5532, because the time of their absence from the Commonwealth of Pennsylvania or residence within the Commonwealth of Pennsylvania under a false name is not a part of the time within which the action or proceeding must be commenced, and Marianne Lilienthal and Jane Doe 1, who were within jurisdiction at the time of the occurrences herein alleged, departed from this Commonwealth and remained continuously absent from this Commonwealth, for over four months, up to present, and/or resided within this Commonwealth under a false name which is unknown to the plaintiffs, up to present.

Plaintiffs were denied a request for specificity of dismissal, on a count-by-count basis. District court may review in forma pauperis complaint and dismiss sua sponte those claims premised on meritless legal theories or that clearly lack any

factual basis. Stotts v. Salas, D.Hawai'i 1996, 938 F.Supp. 663.

Plaintiffs were not granted leave to amend the complaint. The court dismissed on the basis of jurisdiction without an opportunity granted for response by the defendants. Enactment of provision of the Prison Litigation Reform Act (PLRA), requiring dismissal upon defendant's motion of in forma pauperis prison conditions action when complaint failed to state claim upon which relief could be granted, did not alter pre-PLRA rule that in forma pauperis plaintiffs facing dismissal for failure to state claim should receive leave to amend complaint before dismissal, unless amendment would be futile or inequitable. Grayson v. Mayview State Hosp., C.A.3 (Pa.) 2002, 293 F.3d 103.

Court is obliged to construe pro se pleadings and papers liberally. LaBounty v. Adler, C.A.2 (N.Y.) 1991, 933 F.2d 121, on remand. Court of Appeals' review of district court's order dismissing case filed in forma pauperis is plenary. Johnson v. Rodriguez, C.A.1 (Mass.) 1991, 943 F.2d 104, rehearing denied, certiorari denied 112 S.Ct. 948, 502 U.S. 1063, 117 L.Ed.2d 117. Plaintiffs believe that plenary review most certainly ought to have resulted in amended findings and conclusions and a need to exercise appellate Court authority.

While plaintiffs claim that the citation of Callihan prevents any need for them to argue forma pauperis intricacies, the Courts below have inappropriately sought to blend shades of frivolousness into the record. However the case was not required to exhibit extraordinary possibilities in order to avoid dismissal. The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims."Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) A nonfrivolous, nonmalicious complaint may not be dismissed or prevented from being filed solely because of plaintiff's inability to pay court costs. Moon v. Newsome, C.A.11 (Ga.) 1989, 863 F.2d 835, rehearing denied 874 F.2d 821, certiorari denied 110 S.Ct. 180, 493 U.S. 863, 107 L.Ed.2d 135, rehearing denied 110 S.Ct. 380, 493 U.S. 960, 107 L.Ed.2d 364.

But most in support of rehearing, is the fact that the Court has not afforded the parties an opportunity to answer, argue, nor respond to argument. Equally extraordinary is the fact that the fee had been paid early on in the District Court, yet both Courts below have caused a continuing standard and scope defined by forma pauperis considerations.

Action In The Alternative

Appellant alternatively requested extension of time to pay the appeal fee. Procedure under which plaintiff seeking to proceed pro se without prepayment of fees and costs is authorized to proceed in forma pauperis upon payment of such lesser sum in part payment as his financial situation may permit is within authority conferred by this section governing proceeding in forma pauperis. Bullock v. Suomela, C.A.3 (Pa.) 1983, 710 F.2d 102.

The Third Circuit has allowed payment by plaintiff of the docketing fee[2] in case No. 07-2268 (James Schneller et al v. Crozer Chester Med. et al) over a three month period, and allowed payment of the fee in the concurrent appeal No. 07-1949 (Schneller et al v. Fox Subacute Nursing et al), after a period of five months.

In Callihan v. Schneider, 178 F.3d 800, (1999), cited by the trial Court, the 6th Circuit directs that filing fees must be paid within thirty days of a

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[2] Petitioner chose to pay the appeal fees in these appeals by saving strenuously, without first applying to appeal in forma pauperis, even though forma pauperis had been granted in the first round of appeals, because he had been subjected to a §1915 standard of review in the first appeals, which affirmed.

district court's certification that an appeal in forma pauperis (IFP) would not be taken in good faith. This case has not been so certified by the District Court.

District Court was authorized by statute, upon determining that action was frivolous, only to deny leave to proceed in forma pauperis, not to dismiss suit; plaintiff was entitled upon denial of leave to try to find funds required for filing paid suit, and, if successful, to refile suit, at which time dismissal on pleadings would be evaluated. Billman v. Indiana Dept. of Corrections, C.A.7 (Ind.) 1995, 56 F.3d 785.

2. Has a single Judge of the deciding Court erred voluminously, unfairly, and as needful of reversal, in denying a concise motion to amend motion for rehearing, despite that motions' express likelihood of validly affecting the request for rehearing ?

Plaintiffs ask review by the Court of the decision of the Honorable Justice acting singly, because the motion to amend, which was denied, asked inclusion of substantial, worthy issues, including an Order by the trial Court granting appellant leave to appeal in forma pauperis in civil

action No. 08-1479, now USCA 3d No. 09-3855, and a newly discovered right to motion for default judgment, which was prevented by the trial Court's surprise decision. The amendment would not have prejudiced any party, and the Judge had every reason to fairly allow the matters, which were relevant new evidence, just then occurring, in part. The trial Judge had denied all six or more requests of plaintiffs to proceed in forma pauperis over two years, so that grant of forma pauperis in an appeal regarding the same sort of medical-deprival of rights tort, stood as strong evidence of the verity of appellant's litigation and said Judge's awareness of the verity and strength of the cases overall.[6]

Plaintiffs fear that the motion to amend was denied, and moreso may not have been made a part of the record, or not made a part of the record, in time for panel consideration. This would have severely prejudiced the request for reconsideration. Decisions by single judge may even be reviewed by the panel. F.R.A.P.27(c). Plaintiffs claim error of law and abuse of discretion through an express unfairness. Action was taken on the motion for reconsideration on the Tuesday following decision made by the single Judge the prior Thursday. Sua sponte action, unwarranted, may be present as

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[6] The same District Court Judge, since that time, granted forma pauperis in two additional appeals of plaintiffs': USCA 3d No. 09-4372, No. 09-4755

well. No findings nor conclusions were made in the order.

The trial Judg'e grant of forma pauperis feasibly meant that the trial Court was admitting prior error, or had intended that appellant gain review at this juncture and was enabling review, now that a final phase of the litigation had been reached. In the instant case, said grant of forma pauperis on appeal also supports arbitrariness and unfairness because the allegations, taken as true, show, in both cases, severe and intentionally caused injury, and the trial Judge's overt misapplication of law.

There is a great responsibility on a Judge who decides a matter as a single Judge, especially in an appeals Court. The Rules and Local Rules indicate a desire to limit the types of situations where a single judge may decide and these consistently follow a rule of thumb of avoiding unfairness. [3] [4] [5]

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[3] 3d Cir. L.A.R. 27.5 Powers Of Single Judge states: A single judge of the court may not grant or deny a motion that the court has ordered to be acted on by the court or a panel thereof, and ordinarily a single judge will not entertain and grant or deny a motion for release or for modification of the conditions of release pending review in a criminal case, a motion for leave to intervene, or a motion to postpone the oral argument in a case which has been included

see Ninth Circuit LAR 27-1: Circuit Advisory Committee Note To Rule 27-1" . .

> (2) Motions Acted on by a Single Judge. Under FRAP 27(c), a single judge may grant or deny any motion which by order or rule the court has not specifically excluded, but a single

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by the clerk in the argument list for a particular weekly session of the court. The action of a single judge may be reviewed by a panel of the court.

[4] 3d Cir. I.O.P. 10.5.2 states: Without limiting IOP 10.5.1, this court as a matter of practice refers to a single judge, the following motions: (a) stay pending appeal or mandamus (generally only in emergency situations); (b) stay of mandate or recall of the mandate; (c) motion for appointment of counsel whether pursuant to §1915 or under the Criminal Justice Act; (d) approval of transcripts at government expense in criminal and civil cases; (e) motions to withdraw; (f) motions to expedite; (g) motions to intervene; (h) motions to compel the ordering of transcripts; and (i) motions to unseal or seal.

5 FRAP 27(c) states: Power of a Single Judge to Entertain a Motion. A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

judge may not dismiss or otherwise effectively determine an appeal or other proceeding. Thus, a single judge may not grant motions for summary disposition, dismissal, or remand. A single judge is not authorized to grant or deny in its entirety a motion for stay or injunction pending appeal, but may grant or deny temporary relief in emergency situations pending full consideration of the motion by a motions panel. . ."

The statutory authority to single Judges to decide injunction requests for stay or injunction indicates a need for strict adjudication of rights and balancing of rights among parties, while adjudicating the appropriate status quo, in conjunction with determination of likelihood of success on merits and avoidance of irreparable injury. Kimble v. Swackhamer, U.S.Nev.1978, 99 S.Ct. 51, 439 U.S. 1385, 58 L.Ed.2d 225; Meredith v. Fair, U.S.Miss.1962, 83 S.Ct. 10, 9 L.Ed.2d 43; Quinn v. Laird, U.S.Cal.1969, 89 S.Ct. 1491, 23 L.Ed.2d 34 (question of access to military Court of Appeals was a recurring one, so stay was warranted) ; Republican State Central Committee of Arizona v. Ripon Soc. Inc., U.S.Dist.Col.1972, 93 S.Ct. 1475, 409 U.S. 1222, 34 L.Ed.2d 717. (Circuit justice had authority to stay injunction entered by the United States District Court.)

If Circuit Court justices may singly decide

motions for stay and related relief, this is an expression in the law, of a single justice's duty to uphold the intent of the law regarding stays which includes the requirement of maintaining the status quo. What status quo, adjudication of rights and balancing of rights, and avoidance of irreparable injury, are more important than those in a case pending rehearing, that has just been dealt a pronounced unfairness, and yet may now take on a favorable circumstance that could substantially affect the decision ?

Circumstances must be unusual before Supreme Court in its discretion will exercise its power to vacate stay of execution issued by single justice. Rosenberg v. U S, U.S.1953, 73 S.Ct. 1152, 346 U.S. 273, 97 L.Ed. 1607, reconsideration denied 73 S.Ct. 1178, 346 U.S. 324, 97 L.Ed. 1634. All the more reason for a Justice deciding alone, to exercise utmost fairness and impartiality.

Greatly multiplying this duty is the fact that the single Judge was a member of the deciding panel, and the signor of the order now sought to be reconsidered. Impartiality is an ever present requirement in the Court. How can this Justice be assigned the motion duty for a motion standing to affect the motion to reconsider, and ought he not have had it reassigned ? The motion to amend requested en banc treatment - all the more reason for assignment to another Justice on the panel, or

to a Justice not on the panel, especially if en banc consideration was not intended to occur.

This appeal from the order by a single Judge is timely because that order was interlocutory, and since the Clerk never acted on the last filed motion, the limitation of time hasn't even begun. The matter was not appealed earlier because the events subsequent to final Order have made these issues loom as controversial, and earlier, they likely did not stand, alone, sufficient to motion to the Court (e.g. in light of the treatment given to plaintiffs) for a second rehearing request, but now clearly stand in unison with the Clerk's refusal of the fee as actions, separately and together, that deeply affect plaintiffs' rights.

3. Has the Clerk of the Third Circuit Court of Appeals erred egregiously in refusing leave to pay the fee and declaring petitioner's request to be a second motion for rehearing, in declaring that second motions for rehearing are not allowed, and in refusing a motion to that effect, despite the undeniably abundant support for a granting of the request ?

As stated, plaintiffs, in the petition for rehearing, argued the right to forma pauperis, and concluded with an argument supporting extension

of time to pay the fee in the alternative. Plaintiffs pampered the issue of paying the fee, in the motion for rehearing, because the Court had apparently decided it favorably by citing Callihan, which is a decision directing payment of the fee, and plaintiff had no new evidence nor substantial claim of error of law refuting that directive, believing, in fact, that he could gather and pay the fee in a reasonable time, as he has done at a prior instance, as is of record.

Plaintiffs therefore diligently wrote the Clerk requesting additional time to pay the fee but received a letter in response, co-signed by the staff attorney, refusing leave to pay the fee "because a petition for rehearing was denied . . [and] . The Court's rules do not allow for filing multiple petitions for rehearing."

The Clerk appears to utilize a procedural trap that overtly circumvents the intent of the law, namely, that unavailability of the money for docketing fee not prevent a valid case or appeal. If the Court has cited an authority allowing payment of the fee, the Clerk's disallowing of payment is obstructive and improper.

Appellant also relied on the Circuit Court's and the District Court's acts in prior cases. The Circuit Court issued a clear directive in cases No. 07-1949(Schneller et al v. Fox Subacute et al, order

vacated 4/22/08) and No. 07-2268 (Schneller et al v. Taylor Hospital et al, order vacated 4/23/08) that fees be permitted where a forma pauperis case is dismissed and no opposition was made in the proceedings. This is the much the same circumstances as in Callihan . For these reasons and others including the general, consistent law agreeing with this, plaintiff further relied on the citation of Callihan as guaranteeing his right to pay the fee and to request this, after all hope was lost of gaining review without the fee. See Denton v. Hernandez, 504 U.S. 25 ("dismissal for frivolousness under the in forma pauperis statute does not prejudice the filing of a paid complaint making the same allegations") ; Pluck v. Potter, 2002 WL 32107629 (E.D.Pa.) (forma pauperis granted, some counts dismissed "with prejudice," some counts dismissed "without prejudice".) In Redmond v. Gill, 352 F.3d 801 (2003) , citing *Deutsch v. United States,* 67 F.3d 1080, 1083 (3d Cir., 1995) (case remanded for additional time for fee compliance - although court did not specify whether § 1915(d) dismissal was with or without prejudice, order was final and appealable "because an in forma pauperis plaintiff must be afforded appellate review of a determination that he is required to pay all or a portion of the court costs and filing fees to file a claim."). Welch v. Folsom, 925 F.2d 666 (CA 3, 1991) (forma pauperis applicant was granted additional time to pay - held

that orders dismissing complaints without prejudice are not final within the meaning of Section 1291 because the plaintiff may cure the deficiency.) Nagy v. Butner, 376 F.3d 252 (C.A.4th, 2004), petition denied, 544 U.S. 973. ("We do not think, however, that Congress intended a dismissal under § 1915(e)(2)(B)(i) of the in forma pauperis statute to operate as a dismissal with prejudice.") ;

The letter to plaintiff from the Clerk and staff attorney states that "It is further noted that you were previously granted leave to appeal in forma pauperis in" this case. But this fact is irrelevant because the Circuit Court had issued the one sentence order applying Callihan and dismissing appeal, thus carrying with dismissal the Callihan theme of permission to pay the fee and thus enabling appellee's responses.

Prior grant of forma pauperis by the Third Circuit Clerk in this case is irrelevant also because the Court could and arguably did, in the order dismissing appeal, overturn the Clerk's decision, so that payment of the fee is due regardless.

The Circuit Court's order, in fact, does not even find any fact regarding plaintiff's affidavit of indigence, and so the Clerk's prior grant of forma pauperis supports leave now to pay the fee in some measure, because the claim of poverty was at least not originally found frivolous, and the appeal was

in all likelihood not found frivolous in it's substance by the Clerk, and the appeal is not, in fact, frivolous in any way.

Plaintiffs were never directed to the Circuit Clerk's Legal Division, and have learned recently that the Legal Division is an arm of the Third Circuit Clerk that assists forma pauperis and pro se appellants, or at least, may direct them to the proper procedure, especially in the event of deeper issues. The Clerk, on receipt of plaintiffs' request to pay the fee, had a duty to recommend the matter to the Legal Division and/or to refer plaintiff to the Legal Division, for reasons including the Division's expertise in this type of issue. Instead, the matter has been summarily refused by a staff attorney, who has been stated by the Clerk to not be a member of the Legal Division..

In the event that the Court perceived the petition as a petition for re-hearing, plaintiffs asked alleviation under F.R.A.P. 26 regarding time, which states in section (b) that "For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file" a notice of appeal or a petition for permission to appeal. Plaintiffs would request alternatively that their motion for filing of the fee be perceived

as a motion to amend petition for rehearing, or motion to open the matter of rehearing due to inaction of the Clerk. Plaintiffs were entitled to motion for rehearing of the denial of motion for rehearing due to clear error of law in the rehearing process. This includes the motion to review the denial by a single judge. Reference is made to the preceding section of this petition.

VII. CONCLUSION

Petitioner has not raised the numerous sub-issues of the case, in this petition. This case deals with deprivals of civil rights including the very rights to defend life and to seek urgent medical care, outrageously deprived to a plaintiff. Plaintiffs have even pled a right to jurisdiction because they were egregiously deprived their right to litigate this case in the State Courts. The case is not frivolous, and even addresses matters clearly prosecutable under the Pennsylvania and Federal crimes codes. With utmost of respect, it is of record that the trial Court has relied for their decision on a procedural issue unworthy of upholding by any Court, and that the Third Circuit apparently follows in that mode, where a fair and just determination is warranted by the facts and by plaintiffs' pleading and argument.

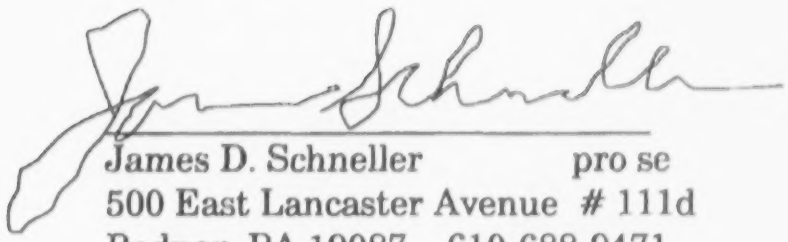
The Court of last resort has decided in a way that conflicts with the United States Constitution and with decisions of certain Circuit Courts, and this Court. There is in the Orders a furthering of deprival of access to justice, remedy for injury, and deprival of property to plaintiffs, in derogation of the United States Constitution. Injustice is apparent. To perform its high function in the best way, justice must satisfy the appearance of justice. In re Murchison, 75 S.Ct. 623 (U.S.Mich.,1955) Access to the courts encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all the charges brought against him or grievances alleged by him. Com. ex rel. Matherly v. Frame, 21 Chest. 283 (Pa.Com.Pl.,1973) Abuse occurs where actions are taken that are intentional or "motivated by bias, bad faith, or partisan or personal motives unrelated to the merits of the matter before it." Rogers v. Bucks County Domestic Relations Section, 959 F.2d 1268, 1277 (3d Cir.1992).

Petitioner, for the above reasons, respectfully requests an order granting certiorari over this case, and review of the orders entered in the Court of appeals, so that a fair and just determination may be made.

Petitioner, in the alternative, requests that the Court vacate the order of the 3d Circuit dismissing the appeal No. 09-1716, and requests remand with

instructions that the manner of approval of the dismissing Order of the 3d Circuit be made a part of the Order, and if that manner was not a unanimous vote, that vacating or reversal be found to be further supported.

Petitioner additionally and/or in the alternative requests that the Court remand, with instructions directing the Clerk of the 3d Circuit to permit payment of the filing fee for the appeal, and reversing the decision of the single judge denying leave to amend the motion for rehearing, or such alternative relief deemed just and proper.



James D. Schneller pro se
500 East Lancaster Avenue # 111d
Radnor, PA 19087 610-688-9471

Date: January 26, 2010

VIII. TEXTS OF PERTINENT STATUTES

Petitioner requests alleviation of the requirement to attached texts of pertinent statutes because he has reprinted the pertinent sections of rules and local rules in the petition, and 28 USC § 1915 was never expressly invoked other than by the Circuit Court Clerk, who granted forma pauperis.

APPENDIX

DLD-226 June 25, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CA No. 09 - 1716

HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER

V.

ABLE HOME CARE INC.; ET AL
A

James D. Schneller, petitioner

(E.D. Pa.. Civ. No. 08-cv-01003)

Present: BARRY, AMBRO and SMITH, Circuit Judges

Submitted is the Clerk's Order for Possible Dismissal Pursuant to 28 USC § 1915 or summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

in the above-captioned case

Respectfully

Clerk

MMW / MJC / tyw

ORDER

The foregoing appeal is dismissed. See Callihan v. Schneider, 178 F.3d 800, 804 (6th Cir.1999) ("Any appeal from an order denying pauper status on appeal will not be entertained and shall be dismissed sua sponte."); Fed. R. App. P.24(a)

By The Court,

/s/ D. Brooks Smith
Circuit Judge

Dated: July 21, 2009
tyw/cc: Mr. James D. Schneller
Holly Nelson
Marianne Lilienthal

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1716

HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER,
JAMES D. SCHNELLER, TRUSTEE AD LITEM
ESTATE OF MARJORIE C. SCHNELLER
MARJORIE ZITOMER, PERSONAL REPRESENTATJVE;
ESTATE OF GEORGE H. SCHNELLER

V

B

ABLE HOME CARE INC.; MARIANNE LILIENTHAL; HOLLY NELSON; JANE DOE 1

James D. Schneller, Appellant

SUR PETITION FOR REHEARING

Present. SCIRICA Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith Circuit Judge

Dated: August 17,2009
tmm/cc: Mr. James D. Schneller
Holly Nelson
Marianne Lilienthal

FILED NOV 13 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ENTERED
NOV 13 2008
CLERK OF COURT

HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER, et al Plaintiffs

CIVIL ACTION

V NO. 08-1003

C

ABLE HOME CARE INC. et al
Defendants

ORDER

STENGEL, J.

AND NOW, this 13th day of November, 2008, upon consideration of the plaintiffs' motion for

extension of time for service (Document #5), it is hereby ORDERED that the motion is DENIED as moot.[1]

BY THE COURT:

/s/ LAWRENCE F. STENGEL, J

[1] On March 10, 2008, I dismissed this case. See Document #3. The plaintiffs failed to file a timely appeal. Accordingly, I will deny the motion as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER, et al Plaintiffs

V

CIVIL ACTION
NO. 08-1003

D

ABLE HOME CARE INC. et al
Defendants

ENTERED
DEC 2 2008
CLERK OF COURT

ORDER

STENGEL, J.

AND NOW, this 1st day of December, 2008, upon consideration of the plaintiffs' motion for "relief from the Order denying the motion for

extension of time. for service" (Document #9), it is hereby ORDERED that the motion is DENIED.[1]

BY THE COURT:

/s/ LAWRENCE F. STENGEL, J

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[1] As indicated in the Order dated November 13, 2008, I disrnissed this case on March 10, 2008 for lack of jurisdiction. See Document #8. I also denied thc plaintiffs' motion to proceed *in forma pauperis* See Documcnt #3. The plaintiffs failed to appeal. Contrary to the plaintiffs' assumption, the subsequent paying of thc filing fee had no affect on the case's dismissal.